Session IV: How to Re-Develop a Brownfield or Acquire a Property with a Little Dirt on It

The Legal Considerations
Polly Jessen

NAIOP Colorado 2011 Educational Series
“Community Development in the New Economy”

The Legal Considerations: Sources of Liability

- CERCLA
- Other Federal Statutes
  - RCRA
  - Clean Water Act
  - TSCA
- State Statutes
  - RCRA
  - CERCLA analogues
  - Disclosure statutes
  - Other transfer, reporting and cleanup requirements
  - Gas and electric tariffs??
- State Common Law
## The Legal Considerations: Federal Liability Protections

- CERCLA and the BFPP Defense
- Establishing the Defense
  - Phase I ESA
  - Purchaser has exercised appropriate care
  - No affiliation with the responsible parties
- Not available to “operators” or lessees unless the lessor maintains the defense or lessee has sufficient “indicia of ownership”
- Department of Defense sites and other federal facilities are conveyed with statutory protections

## The Legal Considerations: State Programs

- Voluntary Cleanup Programs
- Orders
  - Mandatory cleanup
  - Covenants not to sue
The Legal Considerations: Private Protections

- Private Contractual Protections
  - Seller releases and indemnities
  - Insurance or other financial assurances for costs of cleanup and indemnities of Seller
  - As-is sales and buyer releases at the time of resale
  - Good disclosure to buyers/lessees
- Best defense: good cleanup and good project management

Questions?

Polly B. Jessen
www.kaplankirsch.com
pjessen@kaplankirsch.com